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First Student, Inc. and General Teamsters Local Union No. 174, affiliated with the International Brotherhood of Teamsters. Cases 19–CA–090217 and 19–RC–082833

May 9, 2013

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On February 4, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.³

AMENDED CONCLUSIONS OF LAW

1. Replace the judge's Conclusion of Law 3 with the following paragraph.

"3. By withholding its annual wage increase to its tier 9 school bus drivers, the Respondent violated Section 8(a)(3) and (1) of the Act."

2. Insert the following paragraph and renumber the subsequent paragraph.

¹ In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by withholding its annual tier 9 wage increase during the critical period, we rely specifically on *Lampi, LLC*, 322 NLRB 502, 502–503 (1996), and *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000). We agree with the judge that, consistent with the holdings in these cases, the Respondent did not rebut the inference that it withheld the wage increase in order to discourage union support and induce employees to vote against the Union.

In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule objections alleging that the polling place conduct of employees Patty Bentley and Diane Rosenberg intimidated employees, thereby affecting the results of the election.

² We shall amend the judge's conclusions of law to clarify that the Respondent violated Sec. 8(a)(3) and (1) by withholding the tier 9 wage increase and independently violated Sec. 8(a)(1) by informing employees that it was withholding the increase because of the pending election.

³ We shall order the Respondent to electronically post the notice pursuant to *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall also amend the judge's remedy and recommended Order to include the standard remedial provisions for the violations found and to conform to the Board's customary language.

"4. By informing its employees that it was withholding the tier 9 wage increase because of the pending election, the Respondent violated Section 8(a)(1) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding a wage increase from its tier nine drivers, we shall order it to make its tier nine drivers whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful action against them.⁴

The amount due shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, having found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 19–RC–082833, we shall order that the results of the election held on September 18, 2012, be set aside and that a new election be held at a time to be established by the Regional Director.

ORDER

The Respondent, First Student, Inc., Seattle, Washington, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Withholding wage increases in order to discourage union support and induce employees to vote against the Union.

(b) Informing employees that it is withholding a wage increase because of the pending election.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all tier 9 employees whole for any loss of earnings and other benefits suffered as a result of the

⁴ The Respondent contends that it should not be required to compensate tier 9 employees for their losses because it already gave those employees a wage increase retroactive to the beginning of the 2012–2013 school year. The Respondent shall be given the opportunity to demonstrate that it gave the retroactive increase, and made employees whole, in the compliance stage of these proceedings. See *SNE Enterprises*, 347 NLRB 472, 473 fn. 7 (2006), enf'd. 257 Fed. Appx. 642 (4th Cir. 2007).

discrimination against them, in the manner set forth in the amended remedy section of this decision.

(b) Compensate all tier 9 employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Seattle, Washington, facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2012.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on September 18, 2012, in Case 19–RC–082833, is set aside and that this case is severed and remanded to the Regional Director for Region 19 for the purpose of conducting a new election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by General Teamsters Local Union No. 174, affiliated with the International Brotherhood of Teamsters.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994).

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FIRST STUDENT, INC.

The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. May 9, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withhold wage increases from you in order to discourage union support and induce you to vote against General Teamsters Local Union No. 174, affiliated with the International Brotherhood of Teamsters.

WE WILL NOT inform you that we are withholding the wage increase because of the pending election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make all tier 9 employees whole for any loss of earnings and other benefits resulting from the discrimination against them, plus interest.

WE WILL compensate all tier 9 employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social

Security Administration allocating the backpay award to the appropriate calendar quarters.

FIRST STUDENT, INC.

Anne-Marie Skov, Esq., for the General Counsel.

Danielle Franco-Malone, Esq. (Schwerin Campbell Barnard Iglitzin & Lavitt, LLP), counsel for Charging Party-Petitioner.

Patrick Domholdt, Esq., counsel for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 8, 2013, in Seattle, Washington. The consolidated complaint herein, which issued on November 21, 2012,¹ was based upon an unfair labor practice charge that was filed on September 27 by General Teamsters Local Union No. 174, affiliated with the International Brotherhood of Teamsters (the Union), which also filed objections on September 25. In addition, a report and recommendation on objections and direction of hearing was issued by the Board's Regional Office on November 21. It is alleged that, in about August, First Student, Inc., (Respondent), withheld wage increases for its Seattle area school bus drivers at step 9 of its wage scale, and on about September 14, told its employees that the wage increases for its employees at step 9 of its wage scale were being withheld because the employees had joined and assisted the Union, or engaged in other protected concerted activities. This was also the basis of the Union's objections, which are also before me pursuant to the report and recommendation on objections. The Union's objections also allege that the election results should be overturned because "Anti-Union advocates physically and verbally intimidated voters at the polling place." This objection is not alleged as an unfair labor practice.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

On June 11, the Union filed a Petition to represent all school bus drivers employed by the Respondent in Seattle, Washington. On June 22, the Regional Director approved a Stipulated Election Agreement in the following unit:

All full-time and regular part-time school bus drivers employed by the Employer in Seattle, Washington; but excluding all other employees, office clerical employees, and guards and supervisors as defined in the Act.

The tally of ballots at the election conducted on September 18 showed the following:

¹ Unless stated otherwise, all dates referred to herein relate to the year 2012

Approximate number of eligible voters.....	417
Void ballots.....	2
Votes cast for Petitioner.....	154
Votes cast against participating labor organization..	168
Challenged ballots.....	4
The challenged ballots are insufficient to affect the results of the election.	

On September 25 the Union filed timely objections to the election and to conduct allegedly affecting the results of the election. The objections were:

1. The Employer failed to give eligible voters raises they would normally have received, in violation of Section 8(a)(1)(3).
2. The Employer blamed the Union and the election for its unlawful failure to give annual raises, in violation of Section 8(a)(1).
3. Eligible voters were intimidated into not voting or voting against the Union.
4. Anti-Union advocates physically and verbally intimidated voters at the polling place.

The Respondent has the contract to transport school children in the City of Seattle, and has done so for many years. Its pay scale has nine steps and drivers advance one step for each year that he/she is employed by the Respondent. The first eight steps have specific wage increases while the step 9 wage increase fluctuated from year to year depending on a number of factors, including the economic situation and Respondent's contract with the city. Over the past 7 years, the step 9 drivers have received wage increases every year ranging from 25 to 45 cents hourly, and have received these wage increases prior to the beginning of the school year, shortly prior to September 1. There are currently 168 step 9 bus drivers in the unit.

Prior to the beginning of the school year, the Respondent gave its step 1 through 8 school bus drivers the traditional hourly wage increase granted in the past. No wage increase was given to the step 9 drivers. Instead, they received the following letter from the Respondent:

Seattle Driver Wage Increases

We have received many questions from employees who are at the top of the current wage scale regarding why they did not get an increase in their pay at the start of this school year.

The reason for this is because the company is prohibited by federal law from making unilateral changes to the current pay scale when there is a union election pending. We were unable to change the already existing top pay rate. Employees who were not at the top of the wage scale were advanced to the next step on the scale because those steps were already established. We apologize for this however, we want you to be informed of the reasons.

We hope this answers any questions regarding the wage increases. Please see your manager if you should have any further questions and/or concerns.

The remaining objection relates to certain actions by two employees during the election. Charles Martineau, employed by the Respondent as a standby driver, was the Union observer at

one of the election locations. He testified that during the morning session of the election, two unit employees, school bus driver Patty Bentley, and special Ed driver Diane Rosenberg, came to vote and were disruptive to all those who were present in the room at the time. While in the voting area, in the presence of other employees waiting to vote, they, initially refused to give the Board agent their names, marked their ballots openly, rather than doing so in the voting booth as they were instructed to do by the Board agent, "slammed" their ballots into the ballot box and, in a loud voice, made derogatory and obscene comments about the Union, and said that the employees did not need the Union. Further, the Board agent had to ask them to leave the area on a number of occasions. During this period, there were from two to eight other voters in the room waiting to vote.

III. ANALYSIS

It is alleged that the actions of Bentley and Rosenberg affected the results of the election. During the morning session at one of the election locations, with other voters present, they refused to give their names, made negative and obscene comments about the Union, marked their ballots with a No vote in full view of those present rather than voting in the voting booth as they were asked to do, and refused to leave the area when asked by the Board agent. I begin with the proposition that when the election results are close, as is true herein where the Union lost the election by 14 votes out of 322 ballots cast, the objections must be carefully scrutinized. *Cambridge Tool & Mfg. Co.* 316 NLRB 716 (1995); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 122 (6th Cir. 1992). In these situations, the initial inquiry is whether the allegedly objectionable statements were made by agents of either the union or the employer, or if they were made by a third party, not an agent of either party, and the burden of establishing an agency relationship is on the party asserting its existence. *Millard Processing Services*, 304 NLRB 770, 771 (1991). The Board has long held that it will not set aside an election based on third-party threats unless the objecting party establishes that the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Mastec North America, Inc.*, 356 NLRB No. 110 (2011).

As there is no evidence that either Bentley or Rosenberg are agents of the Respondent, their actions are to be judged under the third-party standard as set forth in *Westwood*, supra. While their actions were clearly obnoxious, rude and childlike, they did not reach the level of being so serious as to create a general atmosphere of fear and coercion. *NLRB v. Precision Indoor Comfort, Inc.*, 456 F.3d 636 (6th Cir. 2006). I therefore recommend that Objections 3 and 4 be overruled.

As regards Objections 1 and 2, and the complaint allegations that the Respondent violated Section 8(a)(1)(3) of the Act by not granting the wage increase to its step 9 drivers, and telling them that it was withholding the increase because of the upcoming union election, the evidence establishes that in the past all drivers received yearly increases on or shortly prior to the beginning of the school year. Although the step 9 drivers did

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not receive a set wage increase each year, unlike the drivers at the lower levels who receive established wage increases yearly, they did receive an increase, ranging from 25 cents to 45 cents hourly from 2005 to 2012. Further, the Respondent's explanation for the lack of an increase for the step 9 drivers was that Federal Law prohibited them "...from making unilateral changes to the current pay scale when there is a union election pending." That is clearly not the law. Rather, the law is that an employer must act in the same manner as if the union and an election were not in the picture. As the Board stated in *Lampi, LLC*, 322 NLRB 502 (1996):

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits.

In *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), the Board provided further guidance in these cases:

Further, while an employer is not permitted to tell employees that it is *withholding* benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be *deferred* until after the election—regardless of the outcome.

Employers in these situations often allege that they are caught between the proverbial "rock and a hard place," but that is not so. As the Court stated in *NLRB v. Otis Hospital*, 545 F.2d 252, 255 (1st Cir. 1976): "Neither granting nor withholding a wage increase has been declared illegal per se. It becomes so only if the employer is found to be manipulating benefits in order to influence his employees' decision during the union organizing campaign."

There can be no doubt that by withholding the wage increase for the step 9 drivers, and by blaming the Union for its failure to grant the increase, rather than by stating that they were deferring the increase until after the election, as stated by the Board in *Noah's*, supra, the Respondent violated Section 8(a)(1)(3) of the Act, and interfered with the employees' free choice in the election. *Dorn Transportation Co.*, 168 NLRB 457 (1967); *The Gates Rubber Co.*, 182 NLRB 95 (1970). Accordingly, I recommend that Objections 1 and 2 be sustained, that the election conducted on September 18, 2012, be set aside, and that a new election be held.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the

Act.

2. The Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding its annual wage increase to its step 9 school bus drivers, and blaming it on the pending union election, the Respondent violated Section 8(a)(1)(3) of the Act.

4. Based upon the Respondent's actions described above, I recommend that the Union's Objections 1 and 2 be sustained, the election conducted on September 18, 2012, be set aside, and a new election be conducted.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1)(3) of the Act and has interfered with the employees' free choice in the election conducted on September 18, 2012, in addition to recommending that the election be set aside and that a new election be conducted, I recommend that the Respondent be ordered to reimburse all of its step 9 school bus drivers for the losses that they suffered as a result of its decision to withhold their yearly wage increase effective in about mid August, 2012, if they have not already done so,² and to post the attached notice to that effect. The amount paid to each step 9 driver shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order the Respondent to file a special report with the Social Security Administration allocating the employees' back wages to the appropriate calendar quarters and to compensate the employees for any adverse income tax consequences of receiving these back wages in one lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended³

ORDER

The Respondent, First Student, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling the step 9 drivers that their regular yearly wage increase could not be given because of the pending union election.

(b) Withholding and refusing to pay a regularly scheduled wage increase because its employees had engaged in union activity.

(c) In any like or related manner, interfere with, restrain, or

² At the conclusion of the hearing herein, Respondent stated that about a week before this hearing it prepared a letter to be sent to all of the step 9 drivers in Seattle, telling them that the Respondent would be giving them the wage increase, retroactive to the middle of August, when the lower level employees received their wage increase, and that they expected that the letter would be sent either the day of the hearing or the following day.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action.

(a) Pay to its step 9 drivers the wage increase that was withheld from them in mid August 2012, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at each of its facilities in Seattle, Washington, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the result of the election conducted on September 18, 2012, is hereby set aside, and that this matter be remanded to the Regional Director for Region 19 to

take the appropriate action pursuant to this decision.

Dated, Washington, D.C. February 4, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT withhold wage increases from our employees because of a pending union election or because the employees engaged in activities in support of a union, and WE WILL NOT tell our employees that they will not receive a wage increase because of a pending union election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make our employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate our employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL pay our step 9 drivers the wage increase that was due them in August 2012, with interest and make them whole for the loss that they suffered when we withheld this wage increase in August 2012.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."